SUPREME COURT OF APPEALS OF VIRGINIA.

VIRGINIA HOT SPRINGS CO. *v.* MCCRAY.

Jan. 17, 1907.

[56 S. E. 216.]

1. Nuisance—Limitation of Actions—Accrual of Right of Action.—An injury resulting from a permanent nuisance must be sued for in one action, and limitations begin to run from the time of the erection of the nuisance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 111.]

2. Limitation of Actions—Ignorance of Cause of Action—Nuisance—Pollution of Water Course.—The declaration in an action for the pollution of a stream by sewage alleged that the pollution had destroyed the water of the stream and the comfort of plaintiff's home, and had continued from the construction of the sewer system and for over five years. Held, that plaintiff could not avoid the bar of limitations created by the five-year statute by claiming that he had failed to discover, not only the character of the injury, but its cause, in time to bring an action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 473, 474.]

3. Waters and Water Courses—Pollution of Stream—Actions—Plea of Limitations.—A plea of limitation to an action for the pollution of a stream by discharging sewage therein, which alleges that the injury complained of was the consequences flowing from the use of a system of sewers which were established by defendant at great cost and in a substantial manner, that the use of the sewers was indispensable to the enjoyment of defendant's property, and that from the time of their construction the use was continued without interruption for more than five years, presents the question whether the injury was of a permanent character, resulting from a permanent structure, determined by a consideration of the acts of defendant and the nature and purpose of the sewers causing the injury; and, on finding the allegations of the plea to be true, the action was barred.

4. Same.—Where, in an action for the pollution of a stream by discharging sewage therein, the declaration alleged that the pollution had destroyed the stream and the comfort of plaintiff's home, and had continued from the construction of the sewers for over five years, a plea of limitations, alleging that the injury complained of flowed from the construction and use of sewers established at great cost in a substantial manner, and that the use of the sewers had continued without interruption for over five years, was proper, as raising the issue whether the injury was of a permanent character

resulting from a permanent structure, and as raising the issue whether the action was barred.

5. Estoppel—Pleading—Acquiescence—Pollution of Water Course—Sewers.—A plea that plaintiff, in an action for the pollution of a stream by the discharge of sewage therein, is estopped, by his acquiescence in the construction of the sewer and improvements causing the injury complained of, from bringing the action, which fails to allege any duty on the part of plaintiff to interpose objection to the construction of the improvements, is bad.

Error to Circuit Court, Bath County.

Action by Mattie A. McCray against the Virginia Hot Springs Company. There was a judgment for plaintiff, and defendant brings error. Reversed, and remanded for new trial.

McAllister & Nelson and D. Harmon, for plaintiff in error. Benjamin Haden and Geo. A. Rivercomb, for defendant in error.

CARDWELL, J. This is a writ of error to a judgment of the circuit court of Bath county in a suit brought by defendant in error to recover of plaintiff in error damages for polluting and befouling the waters of a certain stream, known as "Hot Springs Run," which passes first through the property of plaintiff in error, and then through the lands of defendant in error, which are situated about four miles below.

It appears that plaintiff in error, the Virginia Hot Springs Company, acquired the properties it now holds, situated in Bath county, and which had formerly been used as a summer resort, and about the year 1892 made a great many valuable and expensive improvements in the way of hotels, stables, laundries, residences, etc., needed for conducting on a large scale a health and pleasure resort for the accommodation of something like 1 000 guests, making necessary the employment of about 150 servants and 150 horses, and also constructed a system of sewerage, emptying into a large sewer, which dicharged the collected human and animal excrement, filth, waste, etc., from the hotels, laundries, and other buildings, into the Hot Springs Run.

The declaration sets out the erection of the buildings, mentions the number of guests accommodated, the servants employed, and the horses kept and used by plaintiff in error, the construction of the sewer, the discharge of its contents, etc., into the Hot Springs Run, and charges that by these means the waters of the stream have been rendered and made unfit and unwholesome for the use of man and beast; that the waters have been rendered of no use, value, or service to the plaintiff, who has thereby been deprived of the water for use of stock, for washing clothes, and for other domestic uses to which water is applied, and of water for the proper cultivation of her land; and

that a foul stench has been created, which destroys the comfort of her home.

The plaintiff in error (defendant below) offered a plea of the statute of limitations, alleging that the grievances complained of were the consequences flowing from the construction and use of a system of sewers which were established at great cost, in a substantial and permanent manner; that the use of said sewers was and is permanent and indispensable to the enjoyment of plaintiff in error's property; that from the time of their construction the use of these sewers has continued without interruption and in the same manner, and the pollution of the waters by their use has been continuous in the same manner and to the same extent during the whole period from the construction of the sewerage up to the institution of this suit.

This plea was, on motion of defendant in error, excluded; and this ruling of the court constitutes plaintiff in error's first assignment of error.

The question presented is whether the case falls under the control of the general rule that, in an action for a nuisance, repeated actions may be brought as long as the nuisance continues, or under the exception to that general rule, which is that for injuries of the character complained of in the declaration the cause of action accrues at once, and the whole damage is recoverable in one action. It was plainly the purpose of the rejected plea to put in issue whether or not the structure causing the nuisance complained of in the declaration is permanent and substantial in character, and operates necessarily as an injury to the defendant in error, or deprives her permanently of the use of the waters of Hot Springs Run.

The rule, as stated by Wood in his work on Nuisances (3d Ed., vol. 2, § 869), is: "Where the damages are of a permanent character and go to the entire value of the estate affected by the nuisance, a recovery may be had of the entire damages in one action." And: "So, too, when the nuisance is of such a character that its continuance is necessarily an injury, and it is of a permanent character, so that it will continue without change from any cause but human labor, it is held that the damage is original, and may be at once fully compensated." In support of the statement of the rule just given, the learned author cites and quotes from a long list of authorities.

In St. Louis, etc., Ry. Co. v. Biggs (Ark.) 12 S. W. 331, 6 L. R. A. 804, 20 Am. St. Rep. 174, the Supreme Court of Arkansas cites a number of authorities for the rule, there followed, that "wherever the nuisance is of a permanent character, and its construction and continuance are necessarily an injury, the damage is original, and may be at once fully compensated. In such

case the statute of limitations begins to run from the construction of the nuisance." In that case, however, the alleged nuisance was constructed in 1873, while the injury complained of was in 1885, and the judgment of the lower court for the plaintiff was affirmed; the case being distinguished from a case falling under the rule just stated by the fact that, while the structure (an embankment) was erected by the railway company in 1873, the overflow of plaintiff's land, to recover damages for which he brought his suit, did not occur until 1885, wherefore the nuisance complained of was not a continuing nuisance from the construction of the embankment to the institution of the suit.

In Troy v. Cheshire (N. H.) 55 Am. Dec. 177, frequently cited by text-writers and in the adjudicated cases, the principles of law applying to such a case are stated as follows: "Wherever the nuisance is of such a character that its continuance is necessarily an injury, and where it is of a permanent character, that will continue without change from any cause but human labor, there the damage is an original damage, and may be at once fully compensated, since the injured person has no means to compel the individual doing the wrong to apply the labor necessary to remove the cause of injury, and can only cause it to be done, if at all, by the expenditure of his own means. But where the continuance of such an act is not necessarily injurious, and where it is necessarily of a permanent character, but may or may not be injurious, or may or may not be continued, there the injury to be compensated in a suit is only the damage that has happened. Thus, the individual who so manages the water he uses for his mills as to wash away the soil of his neighbor is liable at once for all the injury occasioned by its removal, because it is in its nature a permanent injury; but, if his works are so constructed that upon the recurrence of a similar freshet, the water will probably wash away more of the land, for this there can be no recovery until the damage has actually arisen, because it is yet contingent whether any such damage will ever arise. A person erects a dam upon his own land, which throws back the water upon his neighbor's land. He will be answerable for such damage which he has caused before the date of the writ, and ordinarily for no more, because it is as yet contingent and uncertain whether any further damage will be occasioned or not, because such a dam is not of its own nature and necessarily injurious to the lands above, since that depends more upon the manner in which the dam is used than upon its form. But if such a dam is in its nature of a permanent character, and from its nature must continue permanently to affect the land flowed, then the entire injury is at once occasioned by the wrongful act and may be at once recovered in damages." In that case it was

considered that the railroad was in nature and design a permanent structure, and the use by it of a portion of the highway was therefore a permanent diversion of the property to that use and a permanent dispossession of the town of it; wherefore, for this permanent injury, the town was entitled to recover at once such reasonable damages as it had sustained.

In the case at bar, the plea alleges that the sewer system was in its nature, design, and use a permanent structure. The declaration alleges an actual physical invasion of plaintiff's property and a complete destruction of all useful qualities of the water by substances from defendant's land, and that the nuisance extends to the entire property of plaintiff, affecting its uses for all purposes for which it had theretofore been used.

In Platt *v.* Waterbury (Conn.) 45 Atl. 154, 48 L. R. A. 691, 77 Am. St. Rep. 335, it is said that to turn sewerage into a stream "is in effect an appropriation of the bed of the river as an open sewer, and is an invasion of the property rights of the lower proprietor."

Gould on Waters, § 210, states the rule thus: "The owner of overflowed land may maintain successive actions when, as in the case of destruction of crops from year to year, the wrong does not involve the destruction of the entire estate or its beneficial uses, and the injuries in different years may be included in a single action; but a recovery in a single suit for any unauthorized use of the stream is a bar to a subsequent action. Here, as in the case of a permanent and complete deprivation of the use of the water of the stream, the injury is of a permanent character and goes to the entire value of the estate."

See, also, 8 Am. & Eng. Ency. 684 (the article on "Damages"), where the principle is stated as follows: "For a permanent injury to or trespass upon real estate, all damages, past or prospective, are recoverable in one action; and, where such damages are recoverable, a verdict and judgment will bar a subsequent action for damages from the same injury. Where, however, the injury or trespass is only temporary in character, only such damages are, in general, recoverable as have accrued up to the date of the institution of the action."

In 10 Am. & Eng. Ency. 253, in the article on "Drains and Sewers," it is said: "In an action to recover for an injury to property in consequence of the construction, maintenance, or use of sewers, the measure of damages is the loss actually sustained, which in the case of a permanent injury will ordinarily be the diminished value of the property."

In the case of Paris *v.* Allred (Tex. Civ. App.) 43 S. W. 62, the action was for damages for a nuisance resulting from the construction and operation of a sewer by the defendant, whereby

its sewerage was discharged into a branch running through plaintiff's land, rendering the water unfit for use, noxious, unhealthy, and poisoning the air about his dwelling; and the court said:

"The main question in the case to be determined is whether or not the cause of the nuisance is permanent in its character and entitled plaintiff to recover all the damages that he has or may sustain in one suit, or whether the nuisance is temporary in its nature and entitles plaintiff to recover only such special damages as may have accrued up to the time of the suit.

"The principle underlying the case of Rosenthal *v.* Railway Co. (Tex. Sup.) 15 S. W. 268, is applicable to this case. In that case Justice Gaines, speaking for the court, says: 'When the injury is liable to occur only at long intervals, or when the nuisance is likely to be removed by any agency, the damages which have occurred only up to the time of the action will be allowed; but if the nuisance is permanent, and the injury constantly and regularly recurs, then the whole damage may be recovered at once. In a case like this, the resulting depreciation in the value of the property is the safest measure of compensation.'

"We think it clear from the evidence in this case that the damages to appellee's land result from a cause permanent in its character. When the sewer—the cause of the injury—was constructed, it was evidently intended by the city authorities that it should be permanent, and it has been so treated and used ever since. As long as the sewer is used, just so long will the nuisance be constant, continuous, and injurious to appellee's land. No move has been made by the city authorities to abate the nuisance, and, the evidence showing the same to be permanent, the appellee is entitled to recover all the damages that have or may accrue by reason of the nuisance."

The case of Umscheid *v.* City of San Antonio (Tex. Civ. App.) 69 S. W. 496, was an action to recover damages for injury to a riparian owner, caused by sewerage in a stream. Held, that "it was proper to submit to the jury the question whether the injury to plaintiff's lands was temporary or permanent; and, if the defendant can show that it can and will discontinue the injury, then it should be held to be temporary, and not permanent."

In Langley *v.* City of Augusta (Ga.) 45 S. E. 487, the principle is reaffirmed that, "if the nuisance is of a permanent and continuous character, the damages to be recovered are all damages, past and future, which the maintenance has occasioned and will occasion in the future."

In the case of Beatrice Gas Co. *v.* Thomas, 41 Neb. 662, 59 N. W. 925, 43 Am. St. Rep. 711, the nuisance complained of

was that the water in plaintiff's well was rendered "unfit for use, dangerous, and unwholesome" by reason of filth and waste from defendant's works percolating into it through the soil; and the opinion of the court says: "The general policy of the law is to avoid multiplicity of actions, and, if practicable, without injustice, to afford compensation in one action for all injuries."

In City of North Vernon *v.* Voegler, 103 Ind. 314, 2 N. E. 821, the action was to recover damages for grading a street, so as to throw water on a lot of the plaintiff, and it was held that all damages must be recovered in one action; citing 3 Sutherland on Damages, 403, where it is said: "When a wrong is done which produces an injury, which is not only immediate, but from its nature must necessarily continue to produce loss, independent of any subsequent wrongful acts, then all the damages resulting, both before and after the commencement of the suit, may be estimated and recovered in one action." The opinion by Elliott, J., says: "The improvement of the street was a permanent one, and, as it was permanent, the cause of action was complete when the damage resulted, and the recovery must not be for part of the damage, or for some damages, but for all of the damages resulting from the wrong which constituted the cause of action." See, also, Bizer *v.* Ottumwa Hydraulic P. Co., 70 Iowa, 145, 30 N. W. 172; Austin, etc., Ry. Co. *v.* Anderson (Tex.) 15 S. W. 484, 23 Am. St. Rep. 350.

The same rule is applied in actions for damages to real estate from the erection by a city of a pesthouse, which was a nuisance, in its vicinity. In City of Paducah *v.* Allen (Ky.) 63 S. W. 981, it was held that the measure of damages was the depreciation in the market or salable value of the plaintiff's land by reason of the location and maintenance of the pesthouse in its vicinity.

So, in the Elevated Railroad Cases, it was held that the damage alleged was, not only interference with access by the structure, but an interference with the light, air, ventilation, and privacy of the premises by the large number of trains which passed, and that as the damage was of a permanent character, and the injury to the plaintiff's property was susceptible of ascertainment when the railroad was completed, the statute of limitations began to run from that time. De Geofrey *v.* Merchants' B. T. R. Co., 179 Mo. 698, 79 S. W. 386, 64 L. R. A. 959, 101 Am. St. Rep. 524. In the opinion in that case, the following rule is quoted with approval: "While there is some conflict between the American cases on this subject, the rule sustained by the great weight of authority seems to be that when, by wrongful acts, a permanent nuisance is created, and the injury therefrom is direct and immediate and complete, so

that the damages can be immediately measured in a single action, the statute of limitations will begin to run from the erection of the nuisance."

The same rule is applied where damages to property result from the maintenance and operation of a railroad in a street, by which smoke, cinders, dirt, etc., are thrown on the adjacent premises. Chicago & E. R. Co. *v.* Loeb (Ill.) 8 N. E. 460, 59 Am. Rep. 341.

Adverting again to Gould on Waters, where the learned author is still discussing the rule to be applied in a case of a permanent and complete deprivation of the use of the water of a stream, in section 416, it is said: "But the rule as to the class of cases is subject to an important modification, where the injury complained of is permanent. In such cases the rule is altered for the sake of convenience, and but one action is allowed. The plaintiff is required to recover in one suit the entire damages, present and prospective, caused by the defendant's act. Injuries caused by permanent structures infringing upon the plaintiff's rights in his land, such as railroad embankments, culverts, and bridges, dams, and permanent pollutions of water, fall in this class." See, also, Fowler *v.* New Haven, etc., Co., 107 Mass. 352; E. L. & B. S. Co. *v.* Comb (Ky.) 19 Am. Rep. 67; Powers *v.* Council Bluffs (Iowa) 24 Am. Rep. 792.

It is argued for defendant in error that to apply the rule contended for by plaintiff in error, by which this action would be barred in five years, would be unreasonable, in that it would require one whose property had been damaged by the alleged nuisance to find out within five years from the beginning of the injury whether it would be continuous. The trouble with this contention is that the declaration alleges that the injury has completely destroyed the water of the stream and the comfort of defendant in error's home, and has continued "from thence hitherto and thereby during all the time aforesaid"; that is, from the time the nuisance was created down to the institution of the suit. The rule of law cannot be changed merely because the plaintiff in such an action has failed to discover, not only the character of the injury, but its cause, in time to bring an action for damages.

The question presented by the rejected plea is simply whether the injury is of a permanent character, resulting from a permanent structure, and is a mere question of fact, which, like all other alleged facts, can be submitted to and decided by a jury. The intention of the defendant in such a case is to be determined in the same way as it is to be determined in other cases, and there is no difficulty in determining it from the defendant's acts and the nature and purpose of the structure which caused the injury.

But the further contention is made for defendant in error that the application of the principle of law under consideration would also be unreasonable, because it would be equivalent to saying that if the right of action was barred in five years the court would be deciding that the defendant could keep up its sewer and continue the poliution of the stream.

No distinction is made in the authorities in the application of the rule in connection with corporations having the power of eminent domain and cases arising where the injury complained of was not caused by the exercise of that power. It would seem, however, that the fact that the injury was caused by the exercise of the power of eminent domain has been considered of no importance, except for the purpose of showing that the structure was permanent in character.

While the great weight of authority sustains the principle invoked by the rejected plea, there are cases which take the opposite view, and this seems to be true of the courts of New York; but in N. Y. & Erie R. Co. *v.* Fifth National Bank, 135 U. S. 432, 10 Sup. Ct. 743, 34 L. Ed. 231, the opinion by Mr. Justice Gray, after stating that the rule prevailing in New York, which allowed repeated actions for continuing injuries, has not prevailed in analogous cases in other jurisdictions, calls attention to the fact that even in a New York case it was observed that "it might be productive of less inconvenience on the whole if an opposite rule prevailed."

Referring to the New York rule, the Supreme Court of Alabama, in Highland *v.* Mathews, 99 Ala. 24, 10 South. 267, 14 L. R. A. 464, says: "There are evidences in the later New York cases that that court has not remained satisfied with the decision in the Uline Case, 4 N. E. 536. The inconveniences which have been developed in the attempts to adhere to that ruling have, however, been obviated, in a great measure, by encouraging such shifts as permitting damages for permanent injury to property to be assessed in such cases if the defendant failed to invoke the benefit of the decision against the propriety of this course, thus allowing the rule as to the measure of damages to be determined by the acquiescence of the parties, rather than by the law; by allowing a judgment for past loss of rentals, and in the same case granting an injunction restraining the further operation and maintenance of the road unless the defendant paid a certain sum equal to the depreciation in value of the property, as for a permanent appropriation. Pond *v.* Metropolitan Elev. R. Co., 112 N. Y. 186, 19 N. E. 487, 8 Am. St. Rep. 734; 3 Sedg. Dam. (8th Ed.) 465, 476, where there is a review and criticism of the New York cases." Nothing is said,

however, in the opinion just referred to, as to how the shifts mentioned would affect the statute of limitations.

Defendant in error relies greatly upon the case of Southside Ry. Co. v. Daniel, 20 Grat. 344; but we are unable to see that the decision in that case is helpful to the view contended for by the learned counsel. In that case the railroad company erected an embankment and other structures across the land of the plaintiff without leaving sufficient arches or waterway to allow the flood waters of Buffalo Run to escape as they had been accustomed. No immediate damage to the land of plaintiff flowed from the erection of the embankment; but some years afterwards, by reason of the stream becoming flooded by an unusual rainfall, the waters accumulated in great quantity upon his land, injuring the same, and for that injury he brought an action to recover damages. In the opinion by Staples, J., it is said: "The rule undoubtedly is that where a wrong or a contract is entire, and might be the subject of a single suit, the law will not permit it to be divided and made the subject of several suits." And, further: "Where the act is unlawful in itself, a right of action accrues immediately, and is held to include all subsequent damage flowing from it. In such cases there can be but one recovery between the parties, as the injury is not the cause of the action. Where, however, the act is lawful in itself, but negligently and improperly performed, the gist of the action is the damage, without which there can be no recovery."

In that case the distinction is clearly drawn between a case where the injury flows immediately from a wrongful act and where such is not the case and the jury would be left to speculate whether any damage is likely to arise. In that connection Bonomi v. Backhouse, 96 Eng. C. L. 622, is cited, in which it was held that no cause of action accrued for the mere excavation by the defendant on his own land, so long as it caused no damage to the plaintiff's. Continuing, Staples, J., says: "The injustice of a contrary rule is made manifest by a single illustration: A railway company, having constructed a defective culvert or other structure, ascertains that the land of the adjoining proprietor will be flooded and injured, and immediately remedies the defect by a proper culvert, so that no damage to the land can ever occur." Although the recovery in that case was sustained, the opinion sanctions the rule that if a right of action accrues so soon as the work is defectively done, and the landowner fails to sue within five years thereafter, his action is barred, though his property should be rendered utterly valueless within the five years.

In the case at bar, both the declaration and plea set forth that the structure of plaintiff in error was of a permanent character,

and from its construction the pollution of the Hot Springs Run, of which the defendant in error complains, then began, and has continued "from thence hitherto and thereby during all the time aforesaid"; that is, during the statutory period.

The case of Doran v. City of Seattle, 24 Wash. 182, 64 Pac. 230, 54 L. R. A. 532, 85 Am. St. Rep. 948, is also relied on for defendant in error; but that case merely holds that, if the act complained of was wrongful in its inception, the continuance thereof for any length of time could not make the act lawful as against the owner of the property.

Statutes of limitation are statutes of repose, operating to bar the right of action and not to transfer any right. Whatever right the defendant in error had she still possesses, the right being in no wise extinguished; but, if she has failed to bring her action on account of the nuisance complained of within the time limit of the statute, she has but lost the right of action. We are of opinion, therefore, that the plea should not have been rejected.

The sixth instruction asked by plaintiff in error was intended to present for consideration the same issue tendered by the rejected plea, which instruction was refused; and this ruling of the court is assigned as error.

It follows from what we have already said that it was error to refuse the sixth instruction.

The purpose of plaintiff in error's plea No. 3, which the court rejected, was to put in issue whether or not the defendant in error was estopped, by her conduct and acquiescence in the construction of the sewer complained of and the pollution of the stream flowing therefrom, to bring this action; but the plea fails to allege any duty on the part of the defendant in error to have interposed objection to the improvements being made by plaintiff in error on its property, including the sewer in question, and therefore we do not think that the court erred in rejecting the plea.

The third assignment of error relates to the manner in which the jury that tried the case was selected and impaneled; but, as that ground of complaint is not likely to arise at another trial of the case, it is not necessary to consider this assignment.

Nor do we deem it necessary to consider the fourth assignment of error, which refers to the refusal to give the instructions asked for by plaintiff in error and the giving of certain instructions of the court and certain instructions asked for by defendant in error. It is not probable that the same state of facts upon which the case was submitted to the jury at the last trial will be brought out by the evidence at another trial, since with the admission of the rejected plea of the bar of the statute of limitations the issues to be tried will be different.

The remaining assignment of error relates to the refusal of

the court to set aside the verdict as contrary to the law and the evidence. As the case has to be remanded for a new trial, we consider it inexpedient to discuss the evidence introduced at the last trial.

For the foregoing reasons, the judgment of the circuit court will be reversed and annulled, and the cause remanded for a new trial, to be had not in conflict with the views expressed in this opinion.

BUCHANAN, J., absent.

Note.

The decision in this case is of far reaching importance, and settles a question hitherto undecided in this state, namely, that the befouling of a stream with human and animal filth from a source that may or may not continue according to its success as a business enterprise, is a permanent nuisance, for which a right of action exists at once for the recovery of all damages, past and future.

A permanent structure has been defined as one that is to continue for all time **except for some unforeseen event,** while a temporary structure is one erected for a known, temporary and limited business. Pickens *v.* Coal River Boom, etc., Co., 51 W. Va. 445, 41 S. E. 400, 90 Am. St. Rep. 819.

From this definition it will be seen that the correctness of the decision in this case is not likely to pass unchallenged. The structure from which this nuisance emanated is a health resort, and each person can decide for himself, from his knowledge of such businesses, whether it would be just to assess future, prospective damages against such a defendant, when it could not avail itself of the statute of limitations.

The general rule is that where the damages resulting from a nuisance are of a permanent character and affect the value of the estate and a recovery for such injury would confer a license on the defendant to continue the cause, a recovery may be had at law of the entire damages in one action; but where the cause of the injury is in the nature of a nuisance and not permanent in its character, but of such a character that it may be supposed that the defendant would remove it rather than suffer at once the entire damage which it might inflict if permanent, then the entire damage cannot be recovered in a single action; but actions may be maintained from time to time as long as the cause of injury continues. Smith *v.* Point Pleasant, etc., R. Co., 23 W. Va. 451; Hargreaves *v.* Kimberly, 26 W. Va. 787, 53 Am. St. Rep. 121; Watts *v.* Norfolk, etc., R. Co., 39 W. Va. 196, 19 S. E. 521, 45 Am. St. Rep. 894, 23 L. R. A. 674; Guinn *v.* Ohio River R. Co., 46 W. Va. 151, 33 S. E. 87, 76 Am. St. Rep. 806; Pickens *v.* Coal River, etc., Co., 51 W. Va. 445, 41 S. E. 400, 90 Am. St. Rep. 819.

If a private nuisance is of such character that its continuance is necessarily an injury, and is of a permanent character, that will continue without change from any cause without human labor, and dependent for change on no contingency of which the law can take notice, then the damage is original and permanent, and a right of action at once exists for recovery of entire damages, past and future; and one recovery is a grant or license to continue the nuisance, and there can be no second recovery for its continuance. It is otherwise where the damage is not continuous, but intermittent,

occasional, or recurrent from time to time. Guinn *v.* Ohio River R. Co., 46 W. Va. 151, 33 S. E. 87.

Permanent damages cannot be recovered for the maintenance of a removable nuisance, but actual damages may be recovered for its maintenance up to the time of judgment, and exemplary damages for its maintenance thereafter. Pickens *v.* Coal River Boom, etc., Co., 51 W. Va. 445, 41 S. E. 400, 90 Am. St. Rep. 819.

Thus, if a private structure or other work on land is the cause of a nuisance or other tort to the plaintiff, the law cannot regard it as permanent, no matter with what intention it was built; and, therefore, damages can be recovered only to the date of the action. So where a stream is wrongfully obstructed by a private dam or canal, the plaintiff injured by it can recover compensation only to the date of the writ. 1 Sedgwick on the Measure of Damages, § 93, quoted with approval in Rogers *v.* Coal River, etc., Co., 39 W. Va. 272, 19 S. E. 401; Pickens *v.* Coal River Boom, etc., Co., 51 W. Va. 445, 41 S. E. 400, 90 Am. St. Rep. 819.

"The deposit of sand is a nuisance to plaintiff's property not of a permanent nature, for there is nothing more shifting than sand, especially when under the influence of moving waters. If the boom caused the deposit its removal, reformation or destruction will entirely remove the holding back force and the unrestrained waters will soon reduce the river bed to its natural level. The giving of permanent damages to the full extent claimed in the declaration would be equivalent to a transfer of plaintiff's water power to the defendant. This plaintiff cannot demand for defendant has the right to abate the nuisance and stop the injury and plaintiff can only ask that until it does so it pay him damages for the continuance thereof, such damages as he suffers by loss of the temporary use of his water power. Guinn *v.* Ohio River R. Co., 46 W. Va. 151, 33 S. E. 87; Rogers *v.* Coal River, etc., Co., 39 W. Va. 272, 19 S. E. 401; McKenzie *v.* R. R. Co., 27 W. Va. 306; Hargreaves *v.* Kimberly, 26 W. Va. 787; Smith *v.* Point Pleasant, etc., R. Co., 23 W. Va. 451." Pickens *v.* Coal River Boom, etc., Co., 51 W. Va. 445, 450, 41 S. E. 400, 90 Am. St. Rep. 819.

"While the count is so framed as to cover permanent damages, yet from the nature of the wrong it is evident that the plaintiff may only recover temporary damages. The boom is not a permanent structure as compared with plaintiff's water power. It is temporary and movable. After it ceases to be useful from the exhaustion of the timber on the waters of the stream it will be removed or abandoned and it is liable at any time to be washed out by the force and effect of repeated floods. A permanent structure is one that is to continue for all time except for some unforeseen event, while temporary structure is one erected for a known temporary and limited business. This boom was never intended to be permanent. Yet this suit is not for the wrongful construction of the boom but it is for the wrongful deposit of sand resulting from the wrongful location and construction of the boom. A different kind of boom or a boom on a different location would not have so affected the deposit of sand. An act in itself perfectly lawful becomes unlawful from its effects on the rights of others." Pickens *v.* Coal River Boom, etc., Co., 51 W. Va. 445, 450, 41 S. E. 400, 90 Am. St. Rep. 819.

Where the damage complained of is occasioned by the erection of piers for a boom in the river, by constructing cribs of logs, and filling them with loose stone, and using them to catch and hold logs, which results in causing the current to flow against and wash

plaintiff's bank, the damage occasioned thereby cannot be regarded as of a permanent character, and a recovery cannot be had at law of the entire damage in one action. Rogers *v.* Coal River Boom, etc., Co., 39 W. Va. 272, 19 S. E. 401.

In Watts *v.* Norfolk, etc., R. Co., 39 W. Va. 196, 19 S. E. 521, 23 L. R. A. 674, 45 Am. St. Rep. 894, the complaint in the declaration is that rock and other matter blasted into a creek by the defendant, and there remaining, and other material thrown over the bank, narrowing the creek channel, did injury by diverting the water against the plaintiff's mill on the opposite bank, lessening the power of the water wheels, and destroying the bed of said road and the crossing of the creek. It was held, that any injury flowing from rock, earth, or other material cast into the creek, and left there, not necessary in the construction of the railroad, was not permanent in its nature but remedial with the removal of the same, and therefore there could be no recovery in that action of damages for all time to come as for a lasting and permanent injury.

In Hargreaves *v.* Kimberly, 26 W. Va. 787, 53 Am. St. Rep. 121, the action was to recover damages for causing surface water to flow on the plaintiff's land by means of ditches, drains, troughs, dams and gutters prepared and dug upon the land occupied by the defendant, which were so dug, that they filled and altered the surface of the defendant's land in such a way that in times of rainfall large quantities of the water which fell on the defendant's land were collected and diverted, and caused to flow in and upon the plaintiff's land. This was held to be a temporary nuisance, because as the court said: "Here the cause may be removed, and it is supposed will be by the defendant, rather than submit to having the entire damages recovered against him, for a permanent injury, or to suffer repeated recoveries as long as the cause of the injury continues."

Damages for a continuing nuisance, such as those arising from overflowing one's land, can only be recovered to the time of commencing suit therefor. Subsequent damage for the continuance of the nuisance gives a new right of action. Rogers *v.* Coal River Boom, etc., Co., 39 W. Va. 272, 19 S. E. 401; Pickens *v.* Coal River, etc., Co., 51 W. Va. 445, 41 S. E. 400, 90 Am. St. Rep. 819.

Where a railroad company builds its road in a street, and thereby injures access to, and damages, a lot abutting on the street, such damage is original and permanent; and the company building the road is liable, but a company subsequently leasing and operating the road is not liable, therefor. Guinn *v.* Ohio River R. Co., 46 W. Va. 151, 33 S. E. 87.

In case of a temporary nuisance, the recovery is limited to the damages occasioned for five years previous to the bringing of his action. Pickens *v.* Coal River Boom, etc., Co., 51 W. Va. 445, 41 S. E. 400, 90 Am. St. Rep. 819.

Where a temporary nuisance prevents the running of a mill, the measure of damages for the interruption of the natural flow of the stream, is what the mill would have been worth during such deprivation of its use, if such deprivation had not taken place; that is, its rental or profitable value. The jury cannot take into consideration the permanent value of the mill, as this would authorize the continuance of the nuisance for all time. Pickens *v.* Coal River Boom, etc., Co., 51 W. Va. 445, 41 S. E. 400, 90 Am. St. Rep. 819.

In case of a temporary nuisance the true measure of damages is the loss sustained by reason of his not having the use of his property five years previous to the bringing of his suit, free from the

alleged nuisance thereto. If this loss was total, then the loss of profits or rental of the property is the true measure of damages. If not total, then the comparative loss of rent or profits is the measure of damages. The elements of loss in case of a removable nuisance are usually measured by the rental value of the property. Pickens *v.* Coal River Boom, etc., Co., 51 W. Va. 445, 41 S. E. 400, 90 Am. St. Rep. 819.

To recover for a permanent injury the declaration must show an intent to claim for permanent injury; therefore, if the nature of the cause of injury is permanent, the character of the declaration could not have entitled the plaintiff to recover for future injury, and thus take away from the defendant the right to remove the source of injury upon his judicial determination that his action was indefensible, and cast the burden upon him at once and irrevocably for damage in future, not yet accrued.

The statute of limitations does not run against a continuing nuisance, except as against the maintenance of the same five years prior to the institution of the suit. Pickens *v.* Coal River Boom, etc., Co., 51 W. Va. 445, 41 S. E. 400, 90 Am. St. Rep. 819.

Where the action is not for the original wrongful cause of a nuisance, but it is for the wrongful continuation thereof, it can not be barred by the statute of limitations, except as to its maintenance five years previous to the institution of the suit. Nor will a judgment in that suit license the continuance of the nuisance, as in case of permanent damages for a permanent nuisance, but rather makes it the more unlawful, as becoming willful in its nature, and will subject the nuisancer to exemplary damages. Pickens *v.* Coal River Boom, etc., Co., 51 W. Va. 445, 41 S. E. 400, 90 Am. St. Rep. 819.

FIRST NAT. BANK OF RICHMOND *et al.* *v.* WILLIAM R. TRIGG CO. *et al.*

Jan. 17, 1907.

[56 S. E. 158.]

1. Constitutional Law—Due Process of Law—Creation of Liens.—Code 1887, § 2485 [Code 1904, p. 1246], giving all persons furnishing supplies to a mining or manufacturing company a prior lien, etc., is not violative of the fourteenth amendment to the federal Constitution, declaring that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 940.]

2. Manufacturers—Furnishing Supplies to Manufacturing Company—Lien.—A corporation engaged in the building and sale of ships used in commerce is a manufacturing company within the statute.

3. Same—Waiver of Lien.—The mere taking of a note by one who has furnished supplies does not amount to a waiver of the